No. 14-103

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IN THE

# Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
*Petitioners,*

v.

ASARCO LLC,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

Whether 11 U.S.C. §330(a) grants bankruptcy judges discretion to award compensation for the defense of a fee application.

## PARTIES TO THE PROCEEDINGS BELOW

Baker Botts L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. were the fee applicants in the bankruptcy court, the appellees in district court, and the appellees in the court of appeals.

ASARCO LLC was the debtor in the bankruptcy court, the appellant in the district court, and the appellant in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner Baker Botts L.L.P. states that it is a limited liability partnership, which has no parent company. Petitioner Jordan, Hyden, Womble, Culbreth & Holzer, P.C. states that it is a professional corporation, which has no parent company, and no publicly held company owns 10%.

Respondent ASARCO LLC is wholly owned, directly or indirectly, by Americas Mining Corporation, which in turn is wholly owned by Grupo Mexico, which is publicly traded in Mexico.

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## BRIEF FOR PETITIONERS

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Petitioners Baker Botts L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-21a) is reported at 751 F.3d 291. The district court's opinion (Pet. App. 22a-54a) is reported at 477 B.R. 661. The bankruptcy court's opinion (Pet. App. 55a-146a) is unreported.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on April 30, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

11 U.S.C. § 330(a) provides:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

## PRELIMINARY STATEMENT

The Bankruptcy Code provides that bankruptcy judges "may award" "reasonable compensation" to attorneys and other professionals who work on behalf of an estate. 11 U.S.C. § 330(a)(1)(A). This core authorization replicates that of fee statutes in other contexts, where the word "may" conveys a broad grant of discretion, subject only to statutory limitations. For bankruptcy cases, the flexible fee process ensures the achievement of broader bankruptcy goals by including:

- **Parity.** Congress adopted the principle of "parity," under which bankruptcy professionals' compensation may not be diminished compared to practitioners in other areas of law—a major departure from the pre-Code "economy of the estate" standard that deliberately undercompensated bankruptcy professionals relative to their peers.
- **Scrutiny.** Unlike their non-bankruptcy peers, bankruptcy professionals must submit detailed fee applications, which any interested party, including the U.S. Trustee or the court, may challenge—even though those parties were not the professionals' client. This deters waste and advances transparency. Because the Code demands fee applications, the costs of preparing and litigating them are compensable; otherwise, core compensation would inevitably be diluted, contravening the principle of parity.
- **Discretion.** The bankruptcy court, after evaluating the application and any objections, has broad discretion to award "reasonable compensation," thereby using the complex process to achieve just results.

This balance encourages highly qualified counsel to accept bankruptcy assignments, a chief legislative goal; counsel know that their compensation will not be diluted simply because they worked in bankruptcy. Rigorous

fee-application scrutiny deters improper or inflated billing. The bankruptcy judge's independent discretion ensures fees that are justified and record-based.

The judgment below destabilizes that system. A party—the debtor's parent company previously defeated in fraudulent-transfer litigation by the professionals—challenged a fee application without justification or merit, yet succeeded in imposing massive defense costs on the professionals. The Fifth Circuit held that those professionals must themselves shoulder the entire expense of successfully defending the fee application. This corrodes the parity principle that Congress has repeatedly endorsed; it also encourages meritless objections that serve only to inflict heavy costs on adversaries. If agenda-pushing non-clients can unilaterally (and with little cost to themselves) reduce the compensation of targeted professionals, those professionals will *always* see their compensation lag behind that of their non-bankruptcy peers.

No case could better illustrate the inequity of the Fifth Circuit's holding. This was—that court readily agreed—one of the largest and most successful Chapter 11 bankruptcies in history. Creditors were fully paid. But ASARCO is now controlled by a parent company that defrauded ASARCO and that bitterly but unsuccessfully fought the exposure of that fraud by ASARCO's bankruptcy counsel, Baker Botts. Exacting revenge, once the parent regained control of ASARCO through the successful reorganization, it attacked all of Baker Botts' fees with such a barrage of objections that petitioners were forced to spend over $5 million solely to defend their core-fee applications. Ultimately, *every single objection* to the core fees was overruled. ASARCO tellingly pursued *none* of them on appeal. The bankruptcy court awarded Baker Botts compensation for its heavy defense costs, *none* of which would be borne by creditors. The district court affirmed, but the Fifth Circuit, while commending the work

performed, reversed solely because it believed that § 330(a) precludes such awards as a matter of law.

The judgment below is a serious outlier, both in this specific context and with respect to this Court's approach to fee awards generally. It should be reversed.

## STATEMENT

### I. BACKGROUND

#### A. The statutory framework

A debtor-in-possession in a Chapter 11 bankruptcy, "with the court's approval, may employ one or more attorneys * * * to represent [it] in carrying out [its] duties under this title." 11 U.S.C. §§ 327(a), 1107(a).[1] Section 330(a) of the Bankruptcy Code gives bankruptcy courts discretion to award such attorneys and other professionals "reasonable compensation" from the estate. Professional compensation under § 330(a) is an "administrative expens[e]" of the estate that must be determined before the bankruptcy case can be closed and creditors' rights enforced. § 503(b)(2).

A professional seeking compensation must file a fee application that includes "a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." Fed. R. Bankr. P. 2016.[2] Throughout the bankruptcy, professionals may periodically apply for interim compensation, which the court may grant after notice and a hearing applying the § 330(a) standards. See § 331. But notwithstanding any interim compensation awards, professionals' total compensation must be finally approved before the close of the bankruptcy case. § 330(a)(1). Final compensation like-

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[1] Unless otherwise indicated, statutory citations refer to the Bankruptcy Code, Title 11 of the U.S. Code.

[2] References to "compensation" and "defense fees" include fee compensation and expense reimbursement, which are both involved here.

wise requires "notice to the parties in interest and the United States Trustee and a hearing," *ibid.*, and the court may award "less than the amount of compensation that is requested" upon the objection of any interested party, the Trustee, or the court itself, § 330(a)(2).

Section 330(a) guides the bankruptcy court's determination of what services are compensable. Rather than list compensable tasks, § 330(a) broadly authorizes courts to award "reasonable compensation for actual, necessary services rendered." § 330(a)(1)(A). The statute enunciates only two prohibitions on compensation: for (1) "unnecessary duplication of services" and (2) services that were neither "reasonably likely to benefit the debtor's estate" nor "necessary to the administration of the case." § 330(a)(4)(A).

Section 330(a) also guides bankruptcy courts "[i]n determining the amount of reasonable compensation to be awarded." § 330(a)(3). The statute includes a targeted method of assessing compensation for only one service, "the preparation of a fee application," which must be based "on the level and skill reasonably required to prepare the application." § 330(a)(6). For everything else, bankruptcy judges must evaluate "the nature, the extent, and the value of such services, taking into account all relevant factors," § 330(a)(3), including six that are express, such as the "rates charged" and whether the "time spent" on a service was reasonably commensurate with the nature of the task. § 330(a)(3)(A)-(F). Of particular relevance here, courts must consider whether services were "necessary to the administration of, or beneficial * * * toward the completion of, a case under this title." § 330(a)(3)(C).

Also among the enumerated factors courts "shall consider" is "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this

title." § 330(a)(3)(F). Compensation parity between bankruptcy and non-bankruptcy attorneys was a central objective of the Bankruptcy Code of 1978. In enacting the Code, Congress repudiated the old "economy of the estate" policy. See H.R. Rep. No. 95-595, at 330 (1977). "Bankruptcy specialists," it recognized, "if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field." *Ibid.*

**B. From "rags to riches": the "most successful Chapter 11" case in history**

For 52 months, Baker Botts navigated ASARCO LLC, the debtor-in-possession, through one of the most complex—and most successful—Chapter 11 bankruptcy cases in American history. When the enormous copper mining, smelting, and refining company entered bankruptcy in 2005, its chances of reorganization were "slim." Pet. App. 62a. ASARCO "had essentially run out of cash," and it faced over $10 billion in asbestos, environmental, and toxic-tort liability. *Id.* at 63a. It was, in the Department of Justice's words, "the largest environmental bankruptcy in U.S. history." *Id.* at 65a. Worsening ASARCO's financial distress were serious corporate-governance and tax problems, a striking workforce, and in particular, its litigious parent company, Americas Mining Corporation. *Id.* at 62a-66a. Just two years before the bankruptcy, the parent had directed ASARCO to transfer its controlling ownership interest in Southern Copper Corporation (SCC) to the parent, "add[ing] insurmountable momentum to ASARCO's spiral into bankruptcy." *Id.* at 68a. Consequently, there was a "significant possibility" that ASARCO would be forced to liquidate, and "[c]reditors were expected to receive cents on the dollar"—"if anything." *Id.* at 63a.

The outcome of the bankruptcy case, however, was "nothing short of extraordinary." Pet. App. 62a. Credi-

tors received *full* payment of all claims, totaling $3.56 billion. *Id.* at 62a, 70a, 84a. Moreover, even after accounting for attorneys' fees, the Plan Administrator *refunded* approximately $70 million to ASARCO at the completion of the bankruptcy. *Id.* at 84a. Baker Botts' efforts transformed "ASARCO * * * from a broke and broken company to a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce." *Id.* at 65a. The lower courts agreed that it was "probably the most successful Chapter 11 of any magnitude in the history of the Code." *Id.* at 99a-100a. See also *id.* at 12a, 23a.

While "Baker Botts performed in an extraordinary fashion in numerous areas" of the complex bankruptcy, the "game-changer" was "Baker Botts' successful prosecution of [a fraudulent-transfer] action to recover ASARCO's crown jewel—its controlling ownership interest in SCC." Pet. App. 43a, 62a, 68a. That prosecution resulted in a judgment against the parent valued at between $7 and $10 billion—the largest ever in a Chapter 11 case and possibly the largest unreversed actual-damages award in American history. *Id.* at 43a & n.11, 68a-69a. The SCC judgment compelled the parent to fund a full-payment plan of reorganization, while the parent received release of the judgment and regained control of a newly viable, reorganized ASARCO. *Id.* at 70a, 84a.

### C. Reorganized ASARCO's fee attack

Baker Botts incurred approximately $113 million in attorneys' fees and $6 million in expenses during the bankruptcy—referred to as "core fees." Pet. App. 56a.[3] The bankruptcy court found Baker Botts' work to be excep-

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[3] Petitioner Jordan, Hyden, Womble, Culbreth & Holzer, P.C. (Jordan Hyden), co-counsel to the debtor-in-possession, incurred approximately $7 million in core fees and expenses. Pet. App. 3a.

tionally efficient. "In terms of complexity and novel issues, few if any chapter 11 cases in United States history rival[ed]" this one. *Id.* at 88a. Moreover, the parent was "wholly uncooperative" throughout the bankruptcy; its "participation almost always took the form of criticism and objections to the Debtors' business judgment, to its lawyers' case handling, and [to] the Debtors' approach to a successful reorganization." C.A. Rec. 7045. Yet Baker Botts resolved ASARCO's massive environmental, tort, tax, and labor liabilities in a "remarkably short period of time" and in a manner that saved ASARCO "decades" of litigation and "hundreds of millions of dollars in professional fees." Pet. App. 73a-78a, 101a. "[N]o other firm could have achieved the results in these cases at the rates charged by Baker Botts"—indeed, for anything "less than $200 million." *Id.* at 90a, 91a.

Throughout the bankruptcy, Baker Botts filed thirteen interim fee applications. Pet. App. 56a-59a; C.A. Rec. 34520-34521. None drew objection from creditors, the U.S. Trustee, or anyone else—even the parent. The court approved each application under § 330(a). *Ibid.* ASARCO, the debtor-in-possession and Baker Botts' client, promptly paid all interim fees. *Id.* at 56a, 57a.

After the plan of reorganization took effect, Baker Botts filed a final fee application seeking approval of the $113 million in core fees and $6 million in expenses that the court had previously awarded on an interim basis. Pet. App. 56a. The fee application and supporting exhibits spanned 18,000 pages. C.A. Rec. 35775-53982. Baker Botts also sought a 20% enhancement ($22 million) to the core fee award for exceptional performance, Pet. App. 56a, which had been previously approved by ASARCO, the debtor-in-possession. Sealed C.A. Rec. 2438.

Upon the plan of reorganization's effective date, ASARCO ceased being the debtor (and Baker Botts' client). It became Reorganized ASARCO, controlled by the

parent against whom Baker Botts had obtained the multi-billion dollar fraudulent-transfer judgment. Pet. App. 3a. When Baker Botts filed its final fee application, Reorganized ASARCO launched an all-out assault, objecting to not only the enhancement, but also to Baker Botts' previously-approved and paid core fees. It attacked everything—time-entry descriptions, task codes in invoices, staffing choices, and the necessity and quality of various legal services. *Id.* at 57a-58a, 104a-130a.

ASARCO stonewalled every effort at efficiently resolving its core-fee objections. It initially refused, for instance, to specify *which* time entries it found "vague" or improperly "block billed," forcing Baker Botts to self-audit thousands of pages of invoices, culminating in a 1160-page supplement. C.A. Rec. 7469-7470, 34615-35774. Yet less than a month before the fee trial, ASARCO served Baker Botts a 104-page report accompanied by a 16-foot-tall stack of schedules containing thousands of pages of individual billing entries alleged to be non-compliant with the U.S. Trustee's guidelines and local rules. C.A. Rec. 7873-7874, 8476-34437; Sealed C.A. Rec. 770-1592. Tellingly, the U.S. Trustee—charged by statute with scrutinizing § 330(a) fee requests, 28 U.S.C. § 586(a)(3)(A)—joined *none* of ASARCO's objections and raised no objections whatsoever to Baker Botts' core fees. Pet. App. 3a, 58a.[4]

ASARCO also demanded immense discovery, forcing production of *every single document* that hundreds of Baker Botts professionals created or received during the 52-month bankruptcy. Pet. App. 3a. Baker Botts retrieved hundreds of boxes of documents from offsite

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[4] In response to ASARCO's objections, Baker Botts "voluntarily * * * credit[ed]" approximately $132,000—one-tenth of 1% of its core fees—back to the estate for certain time entries and expenses. Pet. App. 145a.

storage facilities. Reviewing them required 2,440 hours from teams of Baker Botts' lawyers and staff. Baker Botts ultimately produced 2,350 boxes of hard-copy documents (nearly six million pages) and 189 GB of electronic data (approximately 325,000 documents). Pet. App. 3a; Sealed C.A. Rec. 1916-1918. It then reserved large conference rooms to permit ASARCO's lawyers and experts to review the produced material. ASARCO sent just *two* lawyers, who spent only five days and copied 1% of the material. Sealed C.A. Rec. 1918.

ASARCO's scorched-earth fee attack was tremendously costly to Baker Botts. To defend its core fees, Baker Botts incurred over $5.2 million in fees. It incurred an additional $2.8 million pursuing its enhancement request. Baker Botts sought recovery of those amounts from the bankruptcy court. Pet. App. 57a. The U.S. Trustee did not object to Baker Botts' recovery of fees for defending its core-fee application. *Id.* at 58a-59a.

## II. PROCEEDINGS BELOW

### A. Proceedings in the bankruptcy court

Following a six-day fee trial, the bankruptcy court issued a detailed opinion. Pet. App. 3a, 55a-146a. It evaluated Baker Botts' core fees under § 330(a), *id.* at 86a-103a, and rejected as meritless *every one* of ASARCO's objections to Baker Botts' $113 million core fees. *Id.* at 104a-130a, 144a. It found Baker Botts entitled to an enhancement of those fees for extraordinary performance and results, but limited the 20% enhancement to the work done in the SCC litigation. *Id.* at 133a-135a. The enhancement equaled $4.1 million. *Id.* at 135a & n.103.

The court also awarded Baker Botts $5 million for fees incurred litigating its fee request. Pet. App. 144a. It noted the "unusual circumstances" in which "Baker Botts ha[d] been forced to respond" to ASARCO's barrage of empty objections to the fee application. *Id.* at 141-142a.

"Bankruptcy involves a unique process whereby a lawyer who is compensated by the bankruptcy estate must publicly file his fee statements, and multiple parties are given the opportunity to object." *Id.* at 138a. Fees for successfully "defending their fee applications in a process required by statute," the court reasoned, were compensation for services that were necessary to the administration of the bankruptcy case and beneficial to the estate. *Id.* at 138a, 140a. It also concluded that awarding defense fees was essential to avoid diluting Baker Botts' core fees and thus "undermin[ing]" § 330(a)'s "goal of compensating bankruptcy lawyers the same as non-bankruptcy lawyers." *Id.* at 137a-138a.

**B. Proceedings in the district court and on remand**

On appeal to the district court, ASARCO completely abandoned its objections to the core-fee award and challenged only the enhancement and defense-fee awards. Pet. App. 4a. ASARCO contended that bankruptcy courts are categorically barred from awarding defense fees as a matter of law.

The district court affirmed the enhancement, calling the SCC judgment "a once in a lifetime result." Pet. App. 44a. It also affirmed the bankruptcy court's award of fees for defending Baker Botts' core fees. *Id.* at 45a-47a. Following the "vast majority" of lower courts and the Ninth Circuit, the court concluded that fee disputes necessarily "must be dealt with as part of the administration of the case" and that "Baker Botts's actions in resolving outstanding fee issues clearly benefi[t] the estate." *Id.* at 46a-47a. Moreover, the court reasoned, "compensating bankruptcy lawyers for the preparation of and the successful defense of their fee applications is necessary to avoid unfair dilution of their fees." *Id.* at 46a.

The district court held, however, that fees were not available for pursuing a fee enhancement. Pet. App. 48a-

49a. It therefore remanded to determine whether any of the bankruptcy court's $5 million award pertained to seeking the enhancement. *Id.* at 4a, 50a. After the bankruptcy court confirmed that it had awarded Baker Botts fees only for successfully defending its core fees, *id.* at 149a-150a, the district court affirmed the final fee award. *Id.* at 4a, 157a-166a.[5]

**C. The court of appeals' decision**

ASARCO appealed the district court's judgment to the Fifth Circuit, again challenging both the fee enhancement and the award for Baker Botts' successful defense of its core fees. ASARCO did not challenge the amount of the defense-fee award. Nor did it dispute that, if the bankruptcy court possessed discretion to award defense fees, it reasonably awarded them here. The only defense-fee question before the court of appeals was whether bankruptcy courts may *ever* award fees under § 330(a) to bankruptcy professionals for successfully defending their core fees.[6]

The Fifth Circuit affirmed the lower courts' fee enhancement for the SCC litigation, agreeing that a "'seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result.'" Pet. App. 9a (quoting *id.* at 44a). It found that the crucial fraudulent-transfer judgment was due to Baker Botts' "'creativity, tenacity, and legal talent,'" not weak adversaries or good luck. *Id.* at 12a-13a (quoting *id.* at 68a).

But the court of appeals reversed the award of compensation to Baker Botts for successfully defending its

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[5] Like the bankruptcy court, the district court noted that the same principles supporting trial-level defense fees would justify an eventual award of appellate fees. Pet. App. 143a, 163a-164a.

[6] Baker Botts did not cross-appeal the district court's ruling disallowing fees for pursuing the enhancement request. Pet. App. 4a & n.3.

core-fee application. The court agreed that "the possibility of fee litigation" is "[i]mplicit" in bankruptcy because the fee-application process uniquely permits any interested party to "question bankruptcy professional fees." Pet. App. 15a. It acknowledged that after Baker Botts' "exemplary" work for ASARCO in the SCC litigation against its parent, *id.* at 12a (quoting *id.* at 62a), the parent-controlled ASARCO mounted a "large scale" yet wholly unsuccessful challenge to Baker Botts' core fees, *id.* at 3a. It conceded that defending against ASARCO's objections was incredibly burdensome and imposed a "huge cost" on Baker Botts that diluted its core fees. *Id.* at 3a, 18a-19a. And it recognized that "[t]he Bankruptcy Code plainly intended to erase the 'economy of the estate' rule under pre-existing law" and to compensate bankruptcy professionals on par with practitioners in non-bankruptcy cases. *Id.* at 18a.

Nevertheless, the Fifth Circuit held that "Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." Pet. App. 14a. It expressly rejected the Ninth Circuit's decision in *In re Smith*, 317 F.3d 918 (2002) (abrogated in part on other grounds by *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 531-539 (2004)), which—like almost all courts—read § 330(a) as placing successful-fee-defense compensation "within the bankruptcy court's discretion to award fees for 'reasonable and necessary work.'" *Id.* at 16a (quoting *Smith*, 317 F.3d at 927-929). The Fifth Circuit correctly noted that services are compensable under § 330(a) if "they are likely to benefit a debtor's estate or are necessary to case administration." *Id.* at 15a. But its analysis focused exclusively on whether defending the fee application directly benefits the estate. In its view, the debtor's estate "bear[s] the cost" for work that "primar[il]y benefi[ts]" the professional, making fee defenses categorically non-compensable. *Ibid.* In support, the

court of appeals relied on the Eleventh Circuit's decision denying defense fees in *Grant* v. *George Schumann Tire & Battery Co.*, 908 F.2d 874 (1990). *Ibid.* Even though *Grant* was decided under a materially different prior version of § 330(a) and, unlike here, involved meritorious objections to core fees, the Fifth Circuit insisted that it "more closely reflect[ed] the statute's plain meaning." *Id.* at 16a.

The court of appeals acknowledged that other federal statutes that grant reasonable attorneys' fees are commonly construed to authorize fee-defense compensation. Pet. App. 17a. But it reasoned that those statutes displace the default "American Rule that each party to litigation bears its own costs" because the "losing party" "wears the black hat" and thus "should bear the full costs of counsel." "In bankruptcy," it postulated, "the equities are quite different." *Ibid.* "[R]equiring professionals to defend their fee applications as a cost of doing business is consistent with the reality of the bankruptcy process." *Id.* at 17a-18a. The court concluded that § 330(a)'s "reasonable compensation" provision does not "explict[ly]" displace the American Rule because "it contains no statutory provision for the recovery of attorney fees for *defending* a fee application." *Id.* at 19a (quotation omitted).

The Fifth Circuit side-stepped the disparity between bankruptcy and non-bankruptcy professional compensation wrought by its interpretation of § 330(a). It conceded that Congress wrote a "comparability factor" into § 330(a) to avoid "a professional firm's compensation [being] unfairly diluted below what comparably skilled practitioners receive in non-bankruptcy cases." Pet. App. 18a. And it did not deny that core-fee dilution is the inescapable consequence of categorically denying defense fees. *Ibid.* But because it thought parity "difficult to analyze" and not "easily" discernable by a "litmus test," the court of appeals declared the statute's parity purpose sat-

isfied so long as a bankruptcy attorney's *pre-dilution* "hourly rates" were "comparable" to non-bankruptcy rates. *Id.* at 18a-19a.

Turning to policy considerations, the Fifth Circuit discounted the bankruptcy court's view that barring defense fees creates "an incentive for parties in interest, any of which can object to professional fees, to 'mount objections to extract a fee reduction,'" which, "in turn, might discourage competent counsel from handling bankruptcy cases." Pet. App. 20a (quoting *id.* at 139a). The Fifth Circuit did not dispute that point, but simply proclaimed that "perverse incentives * * * could arise from paying the bankruptcy professionals to engage in satellite fee litigation." *Id.* at 18a. Notably, it did not assert that this concern had come to pass in the Ninth Circuit or other jurisdictions that have long left fee-defense compensation to the bankruptcy courts' discretion.[7]

## SUMMARY OF ARGUMENT

The Fifth Circuit read § 330(a) to categorically bar compensation to professionals for successfully defending their core fees against meritless and burdensome attacks. This was error on every level—text, structure, history, and purpose. Even if not conclusively resolved by those considerations, the Fifth Circuit's view would fail on policy grounds.

I. Section 330(a) affords bankruptcy judges the broadest grant of discretion Congress can bestow—they "may award * * * reasonable compensation" to professionals. § 330(a)(1)(A). The few limits on that discretion are in the text itself and only highlight that fee defenses

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[7] For the same reasons given in their opinions as to Baker Botts, the bankruptcy court awarded Jordan Hyden its fees for litigating the fee application, the district court affirmed, and the Fifth Circuit reversed. C.A. Rec. 435-436, 7068; Pet. App. 2a, 21a. Further references to Baker Botts include both petitioners.

are not excluded from compensability.

For example, courts must consider various factors—not only those that are enumerated, but "all" factors that a court might identify as relevant to the reasonableness of compensation. § 330(a)(3). Through those textual factors, Congress manifested that any service "necessary" to the administration of a bankruptcy "case" (not merely an "estate") is presumptively compensable, and signaled that courts must seek parity of compensation between bankruptcy and non-bankruptcy practitioners. § 330(a)(3)(C), (F). Both principles implicate fee defenses. No case can be administered or closed without accurately determining expenses, including professional compensation. And parity cannot be achieved if fee defenses are always noncompensable. Outside of bankruptcy, a client's willingness to pay ends the matter, but bankruptcy imposes a uniquely rigorous and expensive process for public scrutiny of professional fees. If professionals must inevitably absorb those Code-mandated costs, their compensation is reduced just as if their hourly rates had been cut from the outset. They would be penalized merely for practicing in bankruptcy—the opposite of parity.

The Code demonstrates the breadth of bankruptcy-court discretion by demarcating precisely which services are categorically excluded from compensation. § 330(a)(4). It excludes only services that are *not* necessary to case administration. The Fifth Circuit wrongly added a bar to compensating fee defense—a necessary case-administration service—that Congress did not enact.

These statutory features arose from two principal bankruptcy reforms—the Code's 1978 enactment and major amendments in 1994. Congress was motivated to act because of judicial decisions focusing rigidly on whether services, no matter how necessary or unavoidable, immediately benefited an "estate." Fearing that

high-caliber professionals would depart (or never enter) bankruptcy practice if their compensation was systematically diluted compared to other fields, Congress authorized broad discretion to ensure compensation parity without diminishing the integrity of bankruptcy fees, which it protected via rigorous, public scrutiny. The Fifth Circuit's decision rejects that clear congressional policy and hearkens back to a pre-1978 standard.

Likewise, the Fifth Circuit's decision departs from decisions interpreting other statutes that similarly permit reasonable compensation. Courts—including this Court—uniformly authorize defense fees under those statutes to protect core-fee awards against dilution. Courts have found it easy to determine when to grant or deny defense fees, both in those other statutory contexts *and* under § 330(a). The judgment below is anomalous.

II. Nor do the Fifth Circuit's various policy arguments justify its aberrational decision. After all, Congress itself set the policy—to ensure adequate and non-diluted compensation—and was convinced that doing so *did* benefit not only the "estate" but every participant in the process and the economy as a whole. The Fifth Circuit's categorical bar, no less than the pre-1978 decisions which Congress so thoroughly disapproved, risks pushing the highest quality practitioners out of bankruptcy practice. While this would be dangerous for high-dollar bankruptcies like this one, its effect might be even more pronounced in smaller and consumer bankruptcies, where fee-defense costs often amount to a far higher proportion of core fees.

The Fifth Circuit's policy also misaligns the incentives among the parties. By forcing professionals to bear all defense costs, it encourages meritless objections as a tactic; rational practitioners will surrender by consenting to fee reductions even when objections are wholly meritless (as ASARCO's were here). Leaving defense-fee compen-

sation largely to the court's discretion, by contrast, discourages both improper fee requests *and* improper objections. The Fifth Circuit's other concerns are likewise better addressed via the sound discretion of bankruptcy judges familiar with individual cases than a blanket ban imposed by an appellate court.

## ARGUMENT

The Bankruptcy Code expressly grants bankruptcy courts broad discretion to award professional compensation. That discretion includes the power to award professionals the amounts reasonably incurred to successfully defend their fee applications. Neither the Fifth Circuit nor ASARCO has identified anything in the statute that restricts, much less prohibits, bankruptcy courts' power to award such "defense fees." To the contrary, the text and history of § 330(a), practice under other statutes with similar grants of fee-award discretion to judges, and the broad objectives of the Bankruptcy Code uniformly militate in favor of bankruptcy judges retaining authority to make reasonable awards, subject to appellate review.

### I. Section 330(a) Grants Bankruptcy Judges Discretion To Award Fees For Successfully Defending Fee Applications

Congress has repeatedly worked to foreclose judicially crafted rules that impede bankruptcy courts from awarding reasonable compensation for necessary services. The Fifth Circuit, however, bypassed those textual and structural bulwarks when it categorically proscribed defense fees. This Court should reverse.

#### A. Section 330(a)'s text and structure authorize the award of defense fees

"The starting point in discerning congressional intent is the existing statutory text." *Lamie*, 540 U.S. at 534. The textual question is whether defense fees may ever be part of the "reasonable compensation for actual, neces-

sary services rendered by" a bankruptcy professional that courts "may award." § 330(a)(1)(A). The question is not close: defending the fee application is an "actual, necessary servic[e]," and § 330(a)(4)'s narrow exclusions from compensability confirm that awarding defense fees remains within the bankruptcy court's broad discretion. Discretion to compensate fee defense ensures that professionals obtain non-diluted, "reasonable compensation" for their core bankruptcy work. Section 330(a)'s structure depends upon sound exercises of discretion to achieve the Code's objectives.

1. *Congress framed the compensation system around a broad grant of discretion*

a. Broad bankruptcy-court discretion over fees has long been at the core of § 330(a). Its first clause provides: "After notice to the parties in interest and the United States Trustee and a hearing, * * * the court *may award* * * * reasonable compensation for actual, necessary services rendered by" a bankruptcy professional. § 330(a)(1)(A) (emphasis added). The selected verb "may" carries substantial force in fee-related statutes, as "'[t]he word "may" clearly connotes discretion.'" *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 136 (2005) (quoting *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994)).

This Court reaffirmed that principle last Term. Using operative language similar to the Bankruptcy Code's, the Patent Act provides that judges "may award reasonable attorney fees," subject to the restriction that they may do so only in "exceptional cases." *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1752 (2014) (quoting 35 U.S.C. § 285). The Federal Circuit nonetheless created additional barriers to fee awards. *Id.* at 1754. This Court unanimously rejected that extra-textual approach, because the Patent Act is a "grant of discretion to district courts" limited by the "one and only * * * constraint" that a district court find the case "exceptional."

*Id.* at 1755-1758. The Court refused to "superimpos[e] an inflexible framework onto statutory text that is inherently flexible." *Id.* at 1756. It therefore decided *Octane* on the most basic statutory-construction grounds: "Our analysis begins and ends with the text of § 285." *Id.* at 1755.

This case should be resolved the same way. Like its Patent Act analogue, § 330(a) authorizes an award of reasonable fees in bankruptcy, subject only to carefully crafted limitations. Section 330(a) imposes a series of mandatory but non-comprehensive "factors" for judges to consider. § 330(a)(3). And when Congress wished to categorically exclude "services" from compensability, it did so expressly and precisely. § 330(a)(4). Like the Federal Circuit in *Octane*, the Fifth Circuit here impermissibly created a categorical limitation on discretion that has no textual basis.

b. Successfully defending fee applications fits comfortably within § 330(a)(1)(A)'s authorization to award "reasonable compensation" for "actual, necessary services rendered by" bankruptcy professionals. Other federal statutes that similarly authorize reasonable compensation are consistently interpreted to allow compensation for defending the fee application. See *infra* Part I.C. Most notably, in *Commissioner, INS* v. *Jean*, this Court interpreted the fee provision of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), which authorizes an award of "fees * * * incurred by [the prevailing] party in any civil action" against the United States. 496 U.S. 154, 158 (1990). The Court unanimously awarded "fees for the fee litigation," *id.* at 157, and refused to engraft a nontextual limitation on those defense fees. *Id.* at 160 (holding that fee applicant need not show that government's objections to fee application were not "substantially justified"). The Court explained that "[d]enying attorneys' fees for time spent in obtaining them would dilute the

value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees." *Id.* at 162 (quoting *Gagne* v. *Maher*, 594 F.2d 336, 344 (2d Cir. 1979)) (internal quotation marks omitted).

*Jean* dictates the result here. A statutory grant of authority to award reasonable attorneys' fees necessarily includes discretion to award defense fees to avoid dilution of the core fees previously earned.

2. *The statutory factors support discretion to award defense compensation*

Consistent with bankruptcy's equitable origins, § 330(a) guides bankruptcy courts' exercise of discretion by providing that they "shall consider * * * all relevant factors, including" but not limited to six that are enumerated, in "determining the amount of reasonable compensation to be awarded." § 330(a)(3). Most of the factors are routine, reflecting the "time spent" and "rates charged," and whether the "services were performed within a reasonable amount of time" given the nature of the work. § 330(a)(3)(A), (B), (D). Two factors, however, bear closer examination, because they clarify the scope of compensability and the requirement to compare bankruptcy compensation to that of other fields. § 330(a)(3)(C), (F). A related provision, § 330(a)(6), further confirms the breadth of discretion by supplementing the enumerated factors for only *one* type of service, preparing fee applications.

a. **Successful fee defense is "necessary" to bankruptcy "cases"**

Section 330(a)(3)(C) instructs courts to consider "whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title." This factor fleshes out § 330(a)(1)(A)'s principle that "necessary" services are compensable. And it conclusive-

ly demonstrates that courts may include time spent successfully defending fee applications within "the amount of reasonable compensation to be awarded." § 330(a)(3)(C).

The Fifth Circuit initially acknowledged that § 330(a) expressly frames the compensability threshold in terms of what advances "administration" or "completion" of the bankruptcy "case." Pet. App. 14a-15a. Yet it failed to analyze whether successful fee defenses play such a role, focusing instead on whether such defenses primarily benefit the "estate." *Id.* at 15a-17a. Immediately after correctly stating the statutory test, the court announced that

> [t]he primary beneficiary of a professional fee application, of course, is the professional. While the debtor's estate or its administration must have benefitted from the services rendered, the debtor's estate, and therefore normally the creditors, bear the cost. This straightforward reading strongly suggests that fees for defense of a fee application are not compensable from the debtor's estate.

*Id.* at 15a. But nothing is "straightforward" about that "reading," which ignores the statutory focus on "case" administration and directs its attention instead to what benefits "estates." The Fifth Circuit cited only one case to support its approach, but that case was decided under a prior version of § 330(a) that did *not* textually emphasize a service's role in a "case." See *ibid.* (citing *Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-883 (11th Cir. 1990)).[8]

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[8] In *Grant*, moreover, the fee applicant filed an "abus[ive]" request for core fees. 908 F.2d at 884. The Eleventh Circuit's conclusion that his unsuccessful defense of the fee application "brought absolutely no benefit to the estate," *id.* at 883, must be viewed against that factual backdrop. An unsuccessful defense of an abusive application is not an "actual, necessary servic[e]" under § 330(a)(1)(A) and

The Fifth Circuit's silence about the role of fee defenses within bankruptcy cases is telling. Successfully defending a fee application is both "necessary to the administration of" and "beneficial * * * toward the completion of" a bankruptcy "case." § 330(a)(3)(C). To obtain compensation, bankruptcy professionals must file a detailed application to which any interested party may object. Fed. R. Bankr. P. 2016; § 330(a)(2). The bankruptcy court has an independent duty to ensure that the fees are justified. All of this requires the professional to expend time to respond to objections and justify the fee application before the court. That scrutiny serves to accurately determine the amount of reasonable compensation owed by the estate. This amount must be established because "compensation and reimbursement awarded under section 330(a)" is an "administrative expense" of the estate that *must* be deducted before unsecured creditors may be finally paid. See §§ 503(b)(2), 507(a)(2).

Furthermore, no bankruptcy "case" can be "complet[ed]" until the bankruptcy court makes an order allocating compensation, which requires *both* considering a fee application *and* resolving litigation over any objections. Without this fee-related litigation, as the district court explained, "the bankruptcy case cannot be put to bed." Pet. App. 47a. In short, fee-defense litigation is an integral part of a complex fee-assessment process that the Code specifically mandates.

Even if the Fifth Circuit's estate-centered focus *were* a legitimate exposition of § 330(a), its conclusion would still be wrong, for estates *do* benefit from fee defenses. At a general level, Congress recognized that qualified counsel would depart the bankruptcy field if systematically undercompensated, including by dilution of fees; it believed

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cannot survive § 330(a)(4)'s prohibitions on compensation, discussed *infra* Part I.A.3.

that *everyone*, including creditors, benefits from the positive results that come from high-quality services. See *infra* Part I.B.1. More granularly, the "estate has an interest in obtaining a just determination of the amount it should pay its professionals." *In re First State Bancorp.*, No. 7-11-11916-JA, 2014 WL 1203141, at *2 n.10 (Bankr. D.N.M. Mar. 24, 2014). Such work is "necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system." *Boyd* v. *Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009). Still more concretely, for any estate to proceed to final payment of creditors, administrative-expense priorities *must* be established. See §§ 503(b)(2), 507(a)(2). Thus, the Ninth Circuit rightly stated that successfully defending fee applications *both* is "necessary for the administration of the case *and* provide[s] a benefit to the debtor's estate in determining the amount of the administrative fees that the estate owe[s]." *Smith*, 317 F.3d at 929 (emphasis added).

Finally, the Fifth Circuit's focus on the "primary beneficiary" of defending the fee application, Pet. App. 15a, besides being irrelevant, also "proves too much," as the District of Delaware observed. *In re Worldwide Direct, Inc.*, 334 B.R. 108, 111-112 (D. Del. 2005). All agree that *preparing* fee applications is compensable. And yet,

> [b]y definition, *every* fee petition is for the benefit of the petitioning professional. It is not that the professional benefits that is of consequence; *what matters is whether the professional's obtaining of reasonable compensation is also a benefit to the estate.*

*Ibid.* (emphasis added); see also *infra* Part I.A.2.c (discussing compensability of preparing fee applications). Preparation and defense equally contribute to the ultimate resolution of an accurate payment allocation. A well-grounded fee defense is thus "part and parcel" of the administration of the estate. *Boyd*, 404 B.R. at 483.

### b. The discretion to award defense fees is indispensable for compensation parity

Also among the enumerated factors courts "shall consider" is "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." § 330(a)(3)(F). Congress adopted this "comparability" or "parity" factor to replace the old "economy of the estate" compensation policy, which intentionally directed lesser fees for bankruptcy professionals than non-bankruptcy lawyers. See *infra* Part I.B.1-2 (discussing statutory history of the parity principle). By insisting on compensation parity, this factor confirms that bankruptcy courts have discretion to award defense fees as necessary to prevent the dilution of core fees.

The Fifth Circuit did not dispute that parity is an important statutory purpose or that the arithmetic consequence of categorical defense-fee denial is dilution of core fees. Pet. App. 18a. Nor could it. Section 330(a)'s compensation process fundamentally differs from that in ordinary cases, generating defense obligations that do not arise elsewhere. Fee applications are not comparable to invoices lawyers send outside of bankruptcy. They are lengthy, detailed, and comprehensive narratives describing exactly what was done and why. See Pet. App. 17a; C.A. Rec. 35775-53882 (Baker Botts' application and supporting exhibits). Invoices outside bankruptcy are sent only to clients and often contain privileged information, but bankruptcy-estate professionals *publicly* file fee applications. Fed. R. Bankr. P. 2016. Outside bankruptcy, clients alone can challenge their lawyer's fees, and agreement to pay ends the matter without further scrutiny. Not so under § 330(a)—indeed, Baker Botts' actual client, the debtor in possession, *did* pay the fees at issue here. Pet. App. 56a, 57a. Instead, bankruptcy fee applications' excruciating detail and transparency purposeful-

ly facilitate scrutiny from many *non*-clients, and *any* party in interest can lodge objections. See 3 Collier on Bankruptcy ¶ 330.08[2][b][ii] (16th ed. 2013) (hereinafter Collier) (listing eight possible parties in interest who might challenge a fee award). And while courts rarely interfere in parties' non-bankruptcy fee agreements, "[t]he [Bankruptcy] Court has an independent judicial responsibility to review the fees of professionals, even in the absence of an objection by a party in interest." *In re LaFrance*, 311 B.R. 1, 20-21 (Bankr. D. Mass. 2004); see § 330(a)(2). The non-bankruptcy lawyers operating under the "closest parallel" to § 330(a) are those who must apply to the court for attorneys' fees under fee-shifting statutes, and they may recover the costs of successfully defending a fee application. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659 (9th Cir. 1985); see *infra* Part I.C.

The Fifth Circuit simply bypassed the comparability issue. Finding parity "difficult to analyze," subject to "no litmus test," and ultimately "in the eye of the beholder," it deemed "rough" parity achieved whenever hourly rates are comparable *before* subjecting bankruptcy practitioners to the Code's uniquely intensive fee-review process. Pet. App. 18a-19a. But when inquiries are difficult and context-dependent, the sound exercise of discretion is all the more important. Bankruptcy judges familiar with individual cases, not appellate courts, are "the beholder" whose "eye" must search for parity in the first instance. Thus, the Fifth Circuit's "difficult[y]" in determining whether Baker Botts' dilution—"only about 4.4% of the core fee," *id.* at 19a—implicates the comparability *factor* cannot support a *categorical ban* on defense fees, particularly where smaller cases often feature a much higher relative dilution. See *infra* Part II.A.2.

Comparing hourly rates is, in any event, no benchmark for genuine parity. It is merely a necessary starting point. Allowing core bankruptcy fees to wither under

relentless bankruptcy-specific attacks—forcing practitioners to use up what they have earned by defending those very earnings—is the antithesis of parity. Compensation for successful defenses "is necessary to prevent the dilution that would result if * * * attorneys were forced to absorb the time devoted to successfully litigating a fee award—an outcome that would be contrary to Congressional intent against fee award dilution." *In re Wind N' Wave*, 509 F.3d 938, 945-946 (9th Cir. 2007). Indeed, if counsel always must bear the costs of defending fee claims, courts may as well openly permit lower hourly rates from the beginning. "[R]equiring counsel who has successfully defended a fee claim to bear the costs of that defense *is no different than cutting counsel's rate.*" *Worldwide*, 334 B.R. at 112 (emphasis added).

Worse than mere apathy about dilution, the Fifth Circuit's approach *exacerbates* it by encouraging tactical strikes. "If compensation is not permitted for fees incurred in defending a fee application, creditors" (or any objecting party, like Reorganized ASARCO) "could negotiate reductions in [core] fee awards knowing full well that the attorney is in a no-win situation. Even if the attorney prevails, he or she will in effect have financed the litigation without *any hope of surviving it whole.*" *Worldwide*, 334 B.R. at 111 (emphasis added; citations and quotations omitted).

The bottom line is that reading § 330(a) "[t]o deny * * * reasonable compensation for *successfully* defending [professionals'] fee awards would dilute [their] compensation for 'actual and necessary services.'" *Smith*, 317 F.3d at 929. The Fifth Circuit's destruction of parity is especially apparent on these facts. Outside of bankruptcy, Baker Botts would have incurred no costs to collect fees voluntarily paid by its client (and approved by a neutral party, the U.S. Trustee). In bankruptcy, Baker Botts was forced to spend $5 million litigating those core fees

against a hostile third party. By forcing bankruptcy practitioners like Baker Botts to absorb defense costs that they bear *because they are bankruptcy practitioners*, the Fifth Circuit guarantees that dilution will occur, in contravention of § 330(a)(3)(F)'s factor, which vests courts with compensation discretion precisely to assure parity.

**c. Courts' discretion is further constrained only in one context—fee-application preparation**

Making the statutory commitment of broad general discretion all the clearer, Congress narrowed courts' compensation discretion for just one particular service: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." § 330(a)(6). Compensation for fee-defense litigation, by contrast, remains subject only to the usual application of the § 330(a)(3) factors.

The Fifth Circuit sought to leverage § 330(a)(6) as support for categorically prohibiting fee-defense compensation. See Pet. App. 15a-16a. But for multiple reasons, that conclusion gets the matter entirely backward.

First, the Fifth Circuit correctly observed that "the specification of an award for 'preparation of a fee application' is clearly different from authorizing fees for the defense of the application in a court hearing." Pet. App. 15a. But the implied premise—that § 330(a)(6) "authoriz[es]" *anything*—is wrong. Section 330(a)(6) is "framed not as a conferral of authority but as a limitation of authority that already exists." *Setser* v. *United States*, 132 S. Ct. 1463, 1469 (2012). Like every other compensable service, fee-application preparation must be authorized by § 330(a)(1) and not be precluded by § 330(a)(4). Section 330(a)(6) does not determine *whether*, but *how much*,

to compensate for fee-application preparation. The Fifth Circuit was accordingly wrong to assume, Pet. App. 16a, that fee-application compensation would be categorically barred but for § 330(a)(6).[9]

Second, and worse than thinking that § 330(a)(6) authorizes the compensability of fee-application preparation, the Fifth Circuit believed that to be *all* that § 330(a)(6) achieves. Pet. App. 16a (contending that the provision would otherwise be "superfluous").[10] But as the court acknowledges—in the *same paragraph*—§ 330(a)(6) "emphasizes scrivener's skills over other professional work." *Ibid.* Congress did so, however, not to *authorize* compensation for application preparation, but to mandate special scrutiny of "[a]ny compensation awarded" for that tedious yet largely ministerial work. That deters professionals from using high-billing lawyers for preparing the entire application because, if they do, they will be compensated as if they had been more efficient. See, *e.g.*, S. Rep. No. 103-168, at 27 (1993) (previous Senate version of provision that became § 330(a)(6), directing the court "to recognize the difference between the cost of professional services and services for the preparation of fee applications"). There is nothing superfluous about imposing a unique limit on a single type of service. By contrast with *preparing* the application, *defending* it against objections requires not "scrivener's skills," Pet. App. 16a, but the same kind of lawyering skills that § 330(a)(3)'s general factors already cover.

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[9] "Had Congress intended compensation for professional fee applications to be allowable as 'reasonable and necessary' under Section 330(a)(3)(C), there would have been no need to create the limits specified in subdivision (4)." Pet. App. 16a. The Fifth Circuit's reference to § 330(a)(4) appears to be intended to refer to § 330(a)(6). *Ibid.*

[10] Again, the Fifth Circuit's reference to "Section 330(a)(4)" being rendered superfluous appears to be intended to refer to § 330(a)(6). Pet. App. 16a.

Third, the Fifth Circuit found it "untenable to construe this language [*i.e.*, § 330(a)(6)] *alone* to encompass satellite litigation over a fee application." Pet. App. 16a (emphasis added). That, however, is not petitioners' argument, because § 330(a)(6) does not authorize compensation of any kind; it merely channels discretion in determining the amount. But by directing the right *way* to compensate it, § 330(a)(6) reflects that fee-application preparation is compensable under § 330(a)(1) without being rendered non-compensable under § 330(a)(4). There can be no doubt, then, that such preparation is "necessary to the administration of the case."

As discussed *supra* Part I.A.2.a, fee *defense* is equally "necessary" to case administration because both preparation and defense are inextricably linked components of the same Code-mandated process for determining the estate's administrative expenses. This Court and others have long recognized that there is "no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application." *Jean*, 496 U.S. at 162 (rejecting argument that applicant bears a higher burden to establish compensability of defense fees); accord *Kinney* v. *IBEW*, 939 F.2d 690, 694 n.4 (9th Cir. 1991) (finding "no difference in principle between the time spent preparing a fee application and the time spent successfully defending the application" because "[b]oth are a necessary part of the award of attorney's fees"). That principle resolves this case: Preparation is compensable under § 330(a)(1), and defense must therefore be as well.

3. *Congress addressed what services are categorically non-compensable, and did not exclude fee defense*

Section 330(a)(4)(A) imposes the only categorical prohibitions on "services" bankruptcy courts may not compensate. Where Congress has granted broad discretion

to award fees subject to defined limits, appellate courts may not impose additional restrictions. *Octane*, 134 S. Ct. at 1754-1758. Congress enacted two such limits here. First, "courts shall not allow compensation for unnecessary duplication of services." § 330(a)(4)(A)(i). All agree that does not apply here. Second, courts may not compensate "services that were not (I) reasonably likely to benefit the debtor's estate; *or* (II) necessary to the administration of the case." § 330(a)(4)(A)(ii) (emphasis added). Stated positively, courts may compensate a "servic[e]" that *is* reasonably likely to benefit the debtor's estate or *is* necessary to the administration of the case. See Pet. App. 15a (Fifth Circuit agreeing that "professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration").

The prohibition thus mirrors the mandatory factor contained in § 330(a)(3)(C). So long as a service is "necessary to the administration of the case," a bankruptcy court has discretion to include it within "reasonable compensation." Because successfully defending a fee application is plainly such a necessary service, it is compensable. See *Smith*, 317 F.3d at 928-929; *supra* Part I.A.2.a.

As in *Octane*, § 330(a)(4)(A) imposes the "one and only * * * constraint on district courts' discretion to award attorney's fees." 134 S. Ct. at 1756. By focusing exclusively on whether services directly benefit the "estate," the Fifth Circuit erred by engrafting a categorical limitation on compensation that Congress did not adopt.

* * *

Congress could have built § 330(a) by limiting professional compensation to specific services expressly enumerated in the statute. But it instead invested bankruptcy judges with wide latitude, subject only to the exclusions of § 330(a)(4). The blanket prohibition of fee-

defense compensation in this case is awkwardly superimposed over the intentionally *non*-categorical scheme that Congress actually enacted.

### B. Section 330(a)'s history reflects Congress's purpose of ensuring full compensation to bankruptcy lawyers, including defense fees

The Fifth Circuit's holding that, as a matter of law, § 330(a) does not permit the award of defense fees, Pet. App. 14a, 20a, contravenes the statute's plain text. That text embodies a specific and unambiguous congressional purpose, as § 330(a)'s history reveals, to ensure compensation parity so as to provide top-quality counsel in bankruptcy. The Fifth Circuit's ruling disregarded that purpose and instead deployed arguments that Congress has emphatically repudiated.

#### 1. *The Bankruptcy Code replaced the "economy of the estate" approach with a parity requirement*

Before Congress enacted the Bankruptcy Code of 1978, practitioners were compensated under the old Bankruptcy Act, "which emphasized economy of administration and conservation of the estate." *In re UNR Indus., Inc.*, 986 F.2d 207, 208 (7th Cir. 1993) (citing *In re Beverly Crest Convalescent Hosp., Inc.*, 548 F.2d 817, 820-821 (9th Cir. 1976)). Some courts insisted that any payments "be administered with severe economy * * * so as to reduce to the lowest minimum the costs of administration." *In re Lang*, 127 F. 755, 757 (W.D. Tex. 1904). But even those not inclined to "sever[ity]" nonetheless recognized that the "economical spirit of the Bankruptcy Act" required, at a minimum, awarding "fees at the lower end of the spectrum of reasonableness." *Jacobowitz* v. *Double Seven Corp.*, 378 F.2d 405, 408 (9th Cir. 1967). Bankruptcy counsel were seen to be "acting as officers of the court" who "should not be compensated as generous-

ly as they might be if privately employed." Collier ¶ 330.03[3].

Congress found this short-sighted policy counterproductive to the long-term interests of a functional bankruptcy system—penny-wise but pound-foolish. "Bankruptcy specialists," it recognized, are "who enable the system to operate smoothly, efficiently, and expeditiously." H.R. Rep. No. 95-595, at 330 (1977). But "if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere," it concluded, such practitioners "will not remain in the bankruptcy field." *Ibid.* Losing (and failing to attract) high-quality practitioners would diminish the system's effectiveness, undermining the goals of salvaging businesses (and preventing the loss of jobs) and maximizing recovery for creditors.

A central objective of the Bankruptcy Code of 1978, therefore, was to ensure compensation parity between bankruptcy and non-bankruptcy practitioners. See Springer, Damned If You Do, Damned If You Don't—Current Issues for Professionals Seeking Compensation in Bankruptcy Cases Under 11 U.S.C. § 330, 87 Am. Bankr. L.J. 525, 529 (2013). The joint statement of the floor managers of the bill that became the Bankruptcy Code acknowledged that "[a]ttorneys' fees in bankruptcy cases can be quite large and should be closely examined by the court. However, bankruptcy legal services are entitled to command the same competency of counsel as other cases." 124 Cong. Rec. 32,394 (1978) (Joint Explanatory Statement) (remarks of Rep. Edwards); accord 124 Cong. Rec. 33,994 (1978) (Joint Explanatory Statement) (remarks of Sen. DeConcini). Accordingly, "the policy of [§ 330(a)] is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services" in non-bankruptcy

cases. 124 Cong. Rec. at 32,394.

Congress achieved that objective by enacting the original § 330(a), which expansively authorized "reasonable compensation for actual, necessary services," and mandated that, in fixing such compensation, courts consider "the cost of comparable services other than in a case under this title." 11 U.S.C. § 330(a)(1) (1982). See also Collier ¶¶ 330.03[3], 330.03[12], 330.LH[3] (discussing how the Code "abandoned" the "spirit of economy" principle). Today, § 330(a)(3)(F) reflects that principle. From enactment through today, "the new policy" in § 330(a) has been one of "compensation in parity with that received by attorneys performing services in comparable situations." Collier ¶ 330.03[3]; see also, *e.g.*, *UNR*, 986 F.2d at 209. That principle of parity is so well established that even the Fifth Circuit acknowledged it, Pet. App. 18a, before proceeding to undermine it.

2. *Congress repudiated lingering economy-of-the-estate rulings in its 1994 amendments*

Not all courts eagerly embraced the Code's reforms; some adopted rules that undercut parity and inflicted the harms the Code sought to ameliorate. For example, courts divided over whether preparing and defending fee applications was compensable. See Springer, *supra*, at 529-530 (collecting cases); Collier ¶ 330.03[16][a][i]. In its 1994 amendments to the Code, therefore, Congress substantially expanded § 330(a) to make even more unequivocal its disapproval of artificial and dilutive limits on compensation. Those amendments brought § 330(a) essentially into its present form.

a. Perhaps most significantly, the 1994 amendments added the textual emphasis on "cases" (rather than merely "estates"). This responded to courts that, relying on the comparatively laconic version of § 330(a) from the 1978 Code, insisted on identifying immediate benefits to

the estate before finding a service compensable.

First, Congress added factors governing discretion, including § 330(a)(3)(C), which requires courts to consider whether "services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a *case*" in bankruptcy. § 330(a)(3)(C) (emphasis added). See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224(b), 108 Stat. 4106, 4130 (1994). Some prior caselaw, focusing on "estates," emphasized creditors' immediate interests, but § 330(a)'s premise is that creditors benefit in the long run by fully compensating counsel, including for case-administration services. The original 1992 Senate version of § 330(a) would have required courts to consider "the total value of the estate and the amount of funds available for distribution to creditors." S. Rep. No. 102-279, at 22 (1992). But Congress deleted that myopic estate-focused provision and enacted § 330(a)(3)(C)'s case-focused factor.[11]

Second, through § 330(a)(4)'s textual exclusions, Congress demonstrated that "services" are compensable if they were "reasonably likely to benefit the debtor's estate *or* necessary to the administration of the *case*" § 330(a)(4)(A)(ii) (emphasis added). See 108 Stat. at 4131.

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[11] The Fifth Circuit has gone beyond even the failed Senate value-of-the-estate proposal, which would not have supported a *categorical* defense-fee bar where, as here, creditors are fully paid and bear no fee-defense costs (which instead would be borne solely by now-reorganized ASARCO, the party who caused them). If the court of appeals' ruling would contravene even a proposal that Congress rejected as too severe, it is doubly clear that it contravenes the law Congress actually enacted. Thus, even assuming that bankruptcy courts *may* exercise discretion to deny (or only partially compensate) defense fees because a particular estate has minimal funds to pay creditors—a question this Court need not decide—that could never justify the Fifth Circuit's blanket ban.

This was deliberate. The initial version of § 330(a)(4) in the bill reported by the Senate Judiciary Committee provided that "[t]he court shall not allow compensation for duplicative services or services that are not reasonably likely to *benefit the debtor's estate*." S. Rep. No. 102-279, at 22 (emphasis added). Congress refused to take this backward step, and instead cemented a standard that expressly covers the entire "case," *even if* a given service does not directly benefit the estate.[12]

b. The same provisions also indicated the breadth of bankruptcy-court discretion in other ways. Beyond merely adding the factors, for instance, Congress explicitly authorized consideration of "*all* relevant factors, *including*" but not limited to the six that were expressed. § 330(a)(3) (emphasis added).

Likewise, given the reluctance of some courts to abandon the old economy-of-the-estate approach, Congress could anticipate that old-school judicial hostility to bankruptcy fees would tempt some courts into imposing absolute prohibitions of their own making; this case demonstrates as much. In a stroke, § 330(a)(4) pretermitted any need to predict *specific* manifestations of that hostility. Its text and placement within § 330(a)'s structure sought to forestall *all* such efforts by conclusively drawing the line demarcating where compensation is categorically foreclosed.

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[12] Senator DeConcini vigorously objected to the estate-focused provisions in the initial 1992 Senate version. See S. Rep. No. 102-279, at 54. He warned that they "could lead to the situation where fees for necessary services * * * are denied because they are deemed not reasonably likely to benefit the estate." *Ibid.* In turn, this could "reduce significantly the number of bankruptcy specialists practicing in the area" and "turn the clock back" to pre-1978 conditions. *Ibid.* Congress heeded those concerns by enacting § 330(a)'s provisions that allow compensation for case-administration services.

3. *The Fifth Circuit's categorical defense-fee prohibition contravenes Congress's purpose*

Given this history, the Fifth Circuit's decision—and its rationale—are particularly indefensible. The Fifth Circuit even deployed the very arguments that pre-1994 courts had erroneously made when denying compensation for fee-application preparation and defense. The Fifth Circuit here reasoned that "[t]he primary beneficiary of a professional fee application, of course, is the professional"; estates "normally * * * bear the cost" of compensation for defending fee applications (although not here, where creditors received 100 cents on the dollar); and therefore fee-defense is "a cost of doing business" to be borne by professionals, lest "perverse incentives * * * arise from paying the bankruptcy professionals to engage in satellite fee litigation." Pet. App. 15a, 17a, 18a. The parallels with the pre-1994 (indeed, pre-1978) courts' analysis are striking. Those courts reasoned that "(1) such time benefits only the applicant and not the estate; (2) allowing such compensation encourages excessive fees; and (3) such time is essentially a non-reimbursable cost of doing business." Springer, *supra*, at 530 (summarizing holdings of collected pre-1994 cases).

Hearkening now—in 2014—back to anti-parity and estate-focused analysis is worse than anachronistic. It represents the very ill that Congress sought to correct in 1978 and to finally purge from judicial practice in 1994.

**C. The Fifth Circuit erroneously applied the American Rule, despite unbroken precedent allowing defense fees under other "reasonable compensation" statutes**

The defense-fee award to Baker Botts in this case is wholly justified by § 330(a)'s text, structure, and history. But fee awards are not unique to bankruptcy practice, and experience in other contexts is instructive. Courts,

including this Court, have consistently interpreted other "reasonable compensation" statutes to include fees for defending the fee requests. The reasons for awarding defense fees under these statutes apply equally to bankruptcy cases.

The Fifth Circuit acknowledged that defense fees are available when other statutes include a general grant of authority to award fees. It identified no statute in which defense fees were specifically authorized before courts treated them as compensable. Nor did it point to textual authority in § 330(a) that indicated a limitation on discretion compared to other statutes. Instead, it simply declared that bankruptcy is "different," and rejected the analogy to other statutes out of hand. Pet. App. 17a. This was error.

1. *Statutes using language like § 330(a)'s displace the American Rule and authorize defense fees*

The Fifth Circuit invoked the so-called "American Rule," a presumption that parties to litigation bear their own attorneys' fees. Pet. App. 19a-20a. But that doctrine "is merely a default rule" that is "often changed by statute." *J.R. Cousin Indus., Inc.* v. *Menard, Inc.*, 127 F.3d 580, 583 (7th Cir. 1997). In a host of contexts, Congress has displaced the American Rule with "specific and explicit provisions for the allowance of attorneys' fees." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975); see *id.* at 260 n.33 (collecting statutes).

Section 330(a)(1)'s grant of "reasonable compensation for actual, necessary services rendered" by a bankruptcy professional is one such provision. In *Alyeska*, this Court cited the reasonable-compensation provision in the Bankruptcy Act of 1898—the Bankruptcy Code's predecessor—as an example of an explicit statutory fee allowance that overcame the American Rule. 421 U.S. at 260 n.33. Commentators consistently list § 330(a) of the modern

Bankruptcy Code among "the federal statutes which make specific provision for awards of attorney's fees," thereby displacing the American Rule. 1 Rossi, Attorneys' Fees §§ 10.1, 10.13-10.18 (3d ed. 2001) (hereinafter Rossi); see also 1 Conte, Attorney Fee Awards § 1.1 (3d ed. 1993); 3 *id.* §§ 22.1-22.9. The Fifth Circuit itself noted that § 330(a) represents a "more elaborate framework" for fees than even the 1898 Act had. Pet. App. 20a. Nor has the Fifth Circuit or ASARCO ever denied that § 330(a)(1)'s "reasonable compensation" provision trumps the American Rule by authorizing a bankruptcy professional's recovery of *core fees*.

Instead, the court of appeals drew a curious line, holding that the American Rule bars *defense fees* for bankruptcy professionals because § 330(a) does not "explict[ly]" state that a court may award "'fees for *defending* a fee application,'" Pet. App. 19a (quoting *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006) (Fifth Circuit's emphasis)). But nowhere does it explain why § 330(a)—unlike other federal fee statutes—must specifically single out defense fees for compensation to overcome the American Rule.

The lack of such an explanation is glaring. Numerous federal statutes provide in language similar to § 330(a)'s that a court "may" award a party "reasonable" compensation for attorneys' fees. So far as petitioners know, none of them explicitly authorizes fees for defending the fee application. Yet this Court and the courts of appeals have uniformly interpreted such broad textual grants of fee authority to include authority to award defense fees as inherent in and inextricable from the general grant. The courts of appeals have thus faithfully followed this Court's lead in *Jean*, holding that courts possess discretion to award defense fees to avoid dilution of reasonable compensation for core work.

For example, the courts of appeals "consistently have

construed the Civil Rights Acts to provide for 'fees on fees' despite the absence of clear Congressional directives within those Acts." *Hernandez* v. *Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998). More particularly, courts have interpreted the "reasonable attorney's fee" provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), and the Fair Housing Act of 1968, 42 U.S.C. § 3612(c), to authorize defense-fee awards, even though "those statutes did not expressly" grant compensation for fee litigation. *Wind N' Wave*, 509 F.3d at 942 (collecting circuit cases). And "cases permitting an award of 'fees on fees'" under 42 U.S.C. § 1988, which also authorizes a "reasonable attorney's fee" for prevailing civil rights plaintiffs without specifying that defense fees are compensable, "are legion." *Kinney*, 939 F.2d at 695 n.6 (collecting circuit cases).[13]

2. *Absent express preclusion, defense fees are part of a general grant of discretion*

The Fifth Circuit's analysis was backward. Rather

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[13] See also, *e.g.*, *Gagnon* v. *United Technisource, Inc.*, 607 F.3d 1036, 1044-1045 (5th Cir. 2010) (permitting defense fees under "reasonable attorney's fees" provision of Fair Labor Standards Act, 29 U.S.C. § 216(b)); *Hernandez* v. *Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998) (permitting defense fees under Prison Litigation Reform Act's provision for "fee[s] * * * directly and reasonably incurred in proving an actual violation of the plaintiff's rights," 42 U.S.C. § 1997e(d)(1)); *Student Pub. Interest Research Grp., Inc. of N.J.* v. *Windall*, 51 F.3d 1179, 1190 (3d Cir. 1995) (permitting defense fees under "reasonable attorney * * * fees" provision of Clean Water Act, 33 U.S.C. § 1365(d)); *Angela L.* v. *Pasadena Indep. Sch. Dist.*, 918 F.2d 1188, 1197 (5th Cir. 1990) (permitting defense fees under "reasonable attorney's fees" provision of Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e)(4)(B)); *Powell* v. *C.I.R.*, 891 F.2d 1167, 1172 (5th Cir. 1990) (permitting defense fees under "reasonable litigation costs" provision of Internal Revenue Code, 26 U.S.C. § 7430(a)(2)); 1 Rossi, Attorneys' Fees § 6.15 n.1 (3d ed. 2001) (collecting additional cases addressing these and other statutes).

than looking for some statutory language that specifically authorized defense fees, it needed to identify text that specifically precluded them. Once the American Rule has been displaced and reasonable fees are authorized, the burden belongs with the party objecting to defense fees to demonstrate why the American Rule has suddenly sprung back to life.

Fee statutes empower courts to award defense fees because their broad textual fee authorization vests courts with wide discretion to determine what fees are justified in a particular case. See *Octane*, 134 S. Ct. at 1755-1756. Thus, where a fee statute's text expansively authorizes fees without specifying compensable litigation phases or tasks, the statute is properly construed to *permit* fees for fee litigation, not to *forbid* them. In *Jean*, the statutory trigger was that fees were recoverable if the government's position was not "substantially justified." 496 U.S. at 158 (quoting 28 U.S.C. § 2412(d)(1)(A)). The plaintiff had made that threshold showing, but the government contended that the statute did not permit a defense-fee award unless the district court *additionally* found no substantial justification for the government's position *in the fee litigation*. *Id.* at 157. This Court unanimously disagreed, finding "most telling" the "complete absence of any textual support" for so limiting the district court's power to award defense fees. *Id.* at 158-159. Like "other fee-shifting statutes," the Court observed, the Equal Access to Justice Act's text authorized attorneys' fees "without any reference to separate parts of the litigation," "treating a case as an inclusive whole, rather than as atomized line-items." *Id.* at 159, 162 (citation omitted). The Court thus concluded that once the statute's textual fee-eligibility criteria were met, the fee authorization "cover[s] the cost of all phases of successful civil litigation," including fee litigation. *Id.* at 166.

The Fifth Circuit did not engage that logic, much less

explain why it does not apply to the Bankruptcy Code. But the analogy is unmistakable. Baker Botts satisfied the statutory requirement for fees, and nothing in § 330(a) carves out only *some* "phases of successful [bankruptcy] litigation" as qualifying for fee eligibility. *Jean* alone should suffice to reverse the judgment below.

3. *Defense fees in other contexts avoid fee dilution—a central objective of § 330(a)*

Defense-fee awards are not only a permissible exercise of courts' textually broad discretion to award "reasonable attorney's fees" under other statutes, but they have also been recognized as necessary to avoid diluting core-fee awards below the textually-mandated "reasonable" fee—one of the key objectives of § 330(a).

a. Dilution is an inherent threat to any fee-award regime. "If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased." *Prandini* v. *Nat'l Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978) (holding that Title VII's grant of reasonable attorneys' fees conveys authority to award defense fees). The "vast majority" of courts of appeals has likewise emphasized the core-fee dilution that would inevitably occur if attorneys' fees could not be awarded under fee statutes for time spent defeating fee objections. 1 Rossi § 6.15 (collecting cases).

Such fee dilution would thwart not only the text but also the purpose of fee statutes, further confirming that the textual authority to award "reasonable attorney's fees" encompasses defense fees. As courts have consistently observed, Congress enacts fee statutes to "encourag[e] * * * attorneys to represent" clients in cases that vindicate congressional policies. *Gagne*, 594 F.2d at 344 (quoting *Prandini*, 585 F.2d at 53). Subjecting attorneys to

uncompensated fee litigation, however, "would permit a deep pocket losing party to dissipate the incentive provided by [a fee] award through recalcitrance and automatic appeals." *Ibid.* (quoting *Souza* v. *Southworth*, 564 F.2d 609, 614 (1st Cir. 1977)). Accordingly, courts have routinely concluded that statutory fee provisions granting reasonable attorneys' fees are properly construed to authorize defense-fee awards, lest "the denial of [defense] fees" deprive litigants of competent counsel and "indirectly crippl[e]" the purpose behind Congress's grant of fees. *Hairston* v. *R&R Apartments*, 510 F.2d 1090, 1092 (7th Cir. 1975); accord 1 Rossi § 6.15.

b. All of these rationales are equally consistent with the unambiguous "parity" objective that Congress embraced in § 330(a). See *supra* Parts I.A.2.b, I.B.1. Courts that have found defense fees to be compensable under § 330(a) have recognized them as an essential tool to achieve the statute's anti-dilution goal. *Ibid.* The same threat that *Gagne* recognized—challenges knowingly forced on a successful professional by an objector wishing "to dissipate the incentive" of an award, 594 F.2d at 344—is no less present in bankruptcy, and courts have cited that threat in upholding the legitimacy of defense fees. See, *e.g.*, *Worldwide*, 334 B.R. at 111. Thus, as in other contexts, the discretion to make defense-fee awards must be available in bankruptcy to ensure that professionals' core fees are not diluted in violation of § 330(a)(1)'s command of "reasonable" compensation.

c. The Fifth Circuit attempted to elide these similarities by suggesting that fee awards under fee-shifting statutes are meant to punish the losing party, whereas "[n]o side wears the black hat for administrative fee purposes" in bankruptcy. Pet. App. 17a. But contrary to the "black hat" implication, civil-rights fee awards are "*not* meant as a 'punishment' for 'bad' defendants." *Williams* v. *Hanover Hous. Auth.*, 113 F.3d 1294, 1302 (1st

Cir. 1997) (emphasis added). After all, it is taxpayers who often foot the bill in such cases. Rather, they are "meant to compensate civil rights attorneys who bring civil rights cases," *ibid.*, thus "attract[ing] competent counsel," *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984) (internal quotation marks omitted)—a goal indistinguishable from § 330(a)'s purpose of retaining competent counsel in bankruptcy. Core-fee dilution through the categorical denial of defense fees, whether in bankruptcy or other fee contexts, frustrates the congressional design.

### D. Courts have found no difficulty in awarding (or denying) defense fees

The Fifth Circuit contended that it was "difficult" to apply § 330(a)'s parity rationale to defense fees. Pet. App. 18a. But just as courts have found it easy to prevent dilution of fees under other statutes, they have found it no more complicated under § 330(a) itself. Courts across the country routinely and effectively determine when (and at what level) defense-fee compensation is warranted,[14] and when discretion should be exercised to deny defense fees.[15]

The Fifth Circuit acknowledged that "[c]ase law addressing [defense-fee compensability] is divided," Pet. App. 14a, but it omitted how lopsided the conflict is. "The

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[14] At least thirty-six cases from twenty-nine courts in ten different circuits have acknowledged bankruptcy courts' discretion to award compensation for successful fee defenses. See Pet. App. G (collecting cases).

[15] See Pet. App. 170a (collecting cases discretionarily denying defense fees). Courts readily deny defense fees when the fee-application defense was unsuccessful or for some other reason did not warrant compensation. See, *e.g.*, *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 323 (9th Cir. 1991) (affirming bankruptcy court's denial of fees for a failed defense); *In re Erewhon, Inc.*, 21 B.R. 79, 89-90 (Bankr. D. Mass. 1982) (denying compensation for "time spent by counsel seeking to justify its own request for an excessive fee").

vast majority of courts find that compensating bankruptcy lawyers for the preparation of and the successful defense of their fee applications is necessary to avoid unfair dilution of their fees." Pet. App. 46a (district court opinion). Other than the bankruptcy courts in the Northern District of Texas and Western District of New York, no court has consistently denied defense fees as a matter of law after the 1994 amendments.[16] And, so far as petitioners are aware, only the Northern District of Texas bankruptcy court has denied defense fees when, as here, creditors received 100 cents on the dollar.[17]

Courts, in other words, have long been comfortable treating defense fees as essentially indistinguishable from other services that are compensable. The Fifth Circuit's sudden decision to join the two bankruptcy courts that consistently treat those fees as categorically outside the scope of § 330(a) was erroneous, and this Court should restore Congress's vision of parity achieved through careful scrutiny and the sound exercise of bankruptcy-court discretion.

## II. The Judgment Below Thwarts The Sound Functioning Of The Bankruptcy System

"If we add to all this the apparent sound functioning of the bankruptcy system under the plain meaning approach" discussed above, the Fifth Circuit's policy arguments are all the more "unconvincing." *Lamie*, 540 U.S. at 537. Enforcing the congressional grant of discretion to

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[16] See, *e.g.*, *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006); *In re St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001). A few courts have categorically denied fees for both preparation and defense of fee applications, see Pet. App. G, an indefensible position after the 1994 amendments, see Part I.A.2.c, *supra*.

[17] See *Frazin* v. *Haynes & Boone LLP* (*In re Frazin*), 413 B.R. 378, 407 (Bankr. N.D. Tex. 2009), aff'd in part and rev'd in part on other grounds, 732 F.3d 313 (5th Cir. 2013).

award defense fees has promoted the sound functioning of the bankruptcy system for decades; the court of appeals' categorical bar would obstruct it. None of that court's policy arguments supports a total defense-fee ban. The sound exercise of case-by-case bankruptcy-court discretion fully addresses each concern.

### A. Discretion to award defense fees prevents systemic harms

1. Bankruptcy judges' discretion to award reasonable compensation for defense fees protects against the systemic harms that motivated the major 1978 and 1994 bankruptcy reforms. Congress understood that massive and complex bankruptcies such as ASARCO, Enron, Lehman Brothers, American Airlines, and the City of Detroit, to name a few just since 2000, affect the economic health of entire regions and industries. "The fundamental purpose of reorganization," after all, "is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). In 2011 and 2012 alone, 173 public companies—with assets approaching $175 billion—filed for bankruptcy. Mastroianni, The 2014 Bankruptcy Yearbook & Almanac 31 (24th ed. 2014). Saving businesses, or at least winding them down as efficiently as possible, helps creditors and everyone else involved. Congress saw that high-quality professionals are indispensable in preventing crises from becoming unmitigated disasters in the fast-paced and high-stress arena of bankruptcy practice. Competent representation is central to one of the Code's overriding goals: allowing salvageable companies to "continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 95-595, at 220.

Motivated by these important national interests, Congress sought to dissuade talented practitioners from

leaving (or failing to enter) the bankruptcy field. It concluded that the *ancien regime*, notable for its inherent lack of compensation parity, threatened to deprive businesses of quality counsel at the time they need them most—when their very survival is at stake. See *supra* Part I.B.1. Rules that diminish the incentives of qualified counsel to enter bankruptcy practice mean fewer success stories like ASARCO, "a broke and broken company" transformed into "a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce." Pet. App. 65a.

The Fifth Circuit's approach is particularly discordant given its stated concern that, ordinarily, "almost everyone loses something" in bankruptcy, and so sound policy requires minimizing costs to the estate at the expense of counsel. Pet. App. 16a-17a (quoting *Grant*, 908 F.2d at 882). It rests on the simplistic premise that the "pie" is fixed, making bankruptcy practitioners nothing more than cost centers. This very case proves how wrong that is. As the Fifth Circuit itself acknowledged, "[c]reditors were expected to receive cents on the dollar." *Id.* at 12a (quoting Pet. App. 63a). Yet they were paid *in full*—because Baker Botts expanded the pie beyond any legitimate prospect.[18] The Fifth Circuit could hardly have chosen a less apposite case in which to impose policy views that are at odds with the facts.[19]

2. Defense-fee compensation may be even more ur-

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[18] That included nearly $1.8 billion paid to the Department of Justice and 14 states to fund environmental cleanup. Sealed C.A. Rec. 1665.

[19] Further challenging the Fifth Circuit's premise, Congress has indicated that preserving the estate for general creditors does not trump everything else. It designed a priority distribution scheme in § 507, with ten categories of claims paid before unsecured creditors receive *anything*. Administrative expenses, of which § 330(a) compensation is a subset, constitute merely one of those categories.

gently needed to protect smaller and consumer bankruptcies, which require access to competent, moderately priced counsel. In those cases, the threat of systematic fee dilution from meritless objections is especially acute. For example, in *Smith*, defense fees were about 25% of core fees. 317 F.3d at 922 (firm "recovered approximately $175,000" in core fees and over $47,000 in defense fees and costs).

Defeating objections may require substantial efforts even for small core-fee awards. Objections and defense are hardly scalable to core fees. If solo practitioners and smaller firms must absorb defense costs simply to collect their earned fees, many would surely withdraw from bankruptcy and turn to other practices without such onerous overhead.

3. Remarkably, the Fifth Circuit's response to these serious concerns was to advise professionals to avoid dilution by increasing their upfront, hourly rates in *all* bankruptcies. Pet. App. 18a. n.7. Perversely, this would inflate costs to *all* estates—even when wholly unjustified and unnecessary. Some attorneys would reap windfalls; others might still end up undercompensated. The Fifth Circuit's advice would expose the system as a whole to considerable harm for no gain.[20]

Case-by-case discretion avoids all of that. It allows bankruptcy courts to award defense fees only in the segment of cases where core fees are contested *and* the

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[20] Anticipatorily inflated fees would also be subject to challenge under § 330(a)(3)(B) and (F); parity is no more respected by inflating bankruptcy rates than by diluting them. Likewise, the U.S. Trustee's Guidelines prevent such inflation by requiring evidence that rates charged are *not* higher merely because the case arose in bankruptcy. Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36,248-02, 36,255 (June 17, 2013).

court deems defense fees reasonable based on its day-by-day supervision of the case. Rather than the one-size-fits-all "solution" proffered by the court of appeals, the traditional exercise of discretion by bankruptcy judges permits tailoring and precision.

**B. Discretion to award defense fees aligns the parties' incentives appropriately**

1. Discretion to compensate successful fee-application defenses properly aligns the incentives of both fee applicants and potential objectors. An applicant, aware that it will bear the costs of responding to meritorious objections, will be deterred from inflating bills. Objectors, knowing that the estate will not have to pay defense fees for an unsuccessful fee defense, will remain motivated to raise *meritorious* objections that preserve the estate. But they will remain appropriately deterred from raising *meritless* objections if it is clear that successful fee defenses may be compensated.

The Fifth Circuit's rule, by contrast, would overwhelmingly shift the costs and risks onto fee applicants. As now-Third Circuit Judge Jordan perceived, categorically denying defense fees would "provide an unhealthy incentive for persons opposed to professional fees to mount spurious objections as a means of extracting fee reductions, rather than because the work done for the estate was genuinely not for the benefit of the estate." *Worldwide*, 334 B.R. at 112; accord *Smith*, 317 F.3d at 929. Removing courts' ability to distinguish between meritless and meritorious objections promotes bad behavior by eliminating all downside risk for objectors—even those (like ASARCO) who lose every single objection yet impose extraordinary costs on the applicant, who (like Baker Botts) must respond to all objections, regardless of how meritless.

The disproportionate allocation of costs increases the

likelihood of burdensome fee objections by disgruntled litigants, as in this case. It required little effort for ASARCO to inflict crushing discovery obligations and shotgun objections on Baker Botts; yet ASARCO hardly reviewed the documents it requested and abandoned all of its baseless objections on appeal. See *supra* at 11-13. This distortion of incentives is particularly pronounced where, as here, the objector itself—successfully reorganized ASARCO—is entitled to all the proceeds of the estate. See Pet. App. 84a. Who wouldn't play poker if he keeps the winnings but someone else buys the chips?

If this schematic is frozen into settled law, there is every reason to expect that ASARCO's conduct will be replicated; those similarly situated have little incentive not to emulate ASARCO, and considerable incentive to do so. Rational fee applicants will accede to objectors' extortionate demands at the outset and forfeit duly earned fees, knowing that those fees will be reduced by the cost of litigation *even if they completely prevail*. *Worldwide*, 334 B.R. at 111.

2.a. The court of appeals characterized the incentive structure quite differently: "The perverse incentives that could arise from paying the bankruptcy professionals to engage in satellite fee litigation are easy to conceive." Pet. App. 18a; *id.* at 17a ("Litigation of professionals' fee applications may become substantial, costly and time-consuming if counsel can be compensated for their self-interested efforts."). That is plainly mistaken. Allowing discretionary compensation for *successfully* defending a fee application cannot possibly incentivize bad behavior by a fee applicant.

To begin with, applicants cannot initiate "satellite fee litigation"—an objector or the court must first raise some objection to the application. Once that occurs, the applicant will go *un*compensated for unsuccessfully defending exorbitant requests or (even if successful) wastefully re-

sponding to objections. Compare *Wind N' Wave*, 509 F.3d at 946 (awarding fees where successful defense was not mounted "merely to acquire litigation fees"), with *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 323 (9th Cir. 1991) (affirming bankruptcy court's denial of fees for a failed defense). Defense fees, in other words, are denied where the fee application was "meritless" or defense was undertaken "merely to get litigation fees." *Smith*, 317 F.3d at 928, 929 (citations omitted). See also *supra* n.15.

Awarding compensation when the applicant, as here, successfully and efficiently defends an application accords with the statutory requirement that services be necessary to the administration of the case. See §330(a)(3)(C), (a)(4)(A)(ii)(II); *Smith*, 317 F.3d at 928. Such an adversarial process, necessary for accurately determining the estate's administrative expenses, is precisely what bankruptcy law is designed to encourage. Cf. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418-419 (1978) ("A fair adversary process presupposes both a vigorous prosecution and a vigorous defense.").

b. As another ground for barring defense fees, the court of appeals speculated that a "conspiracy of silence" may sometimes exist between fee applicants and potential objectors. Pet. App. 20a. No evidence supports that assertion. Regardless, it could not justify categorically denying defense fees in the many cases where the fee-application process *is* contested. No "conspiracy of silence" could exist there. And often, as here, there is no motivation for a "conspiracy," given that the objector has no claim for fees from the estate and thus no "conspiratorial" reason to withhold objections to debtor's counsel fees. Far from being tempted into silence, such objectors—like ASARCO—may harbor longstanding animus against the debtor's counsel.

Beyond those scenarios, in all bankruptcies the U.S. Trustee is charged by statute to monitor and object to

unreasonable fees. See 28 U.S.C. § 586(a)(3)(A). Even before the judgment below invited objections to professional fees, they arose in 10% of all (and 20% of large) Chapter 11 bankruptcies.[21] And even absent objections, "[t]he court has an independent obligation to review all fee applications and evaluate the propriety of the compensation requested." Collier ¶ 330.03[5][e]. All of these sources require the good-faith, adversarial defense of fee applications—and inflict fee dilution if successful defenses are never compensated.

But even supposing a conspiracy of silence were ever plotted, and that it somehow evaded the court's and Trustee's independent review, there would be no need for an applicant to request *defense fees* at all. The Fifth Circuit's remedy is untethered to the harm it perceives.

3. If any validity attended the Fifth Circuit's view of incentives, nearly three decades of data—since *Nucorp*—from the Nation's largest bankruptcy circuit would demonstrate as much. Cf. *Lamie*, 540 U.S. at 537 (rejecting argument where "[s]eeming order has attended the [contrary] rule's application for five years in the Fifth Circuit and for four years in the Eleventh Circuit"). Yet the Fifth Circuit steadfastly remained in the realm of speculation. It identified no evidence—not one example—in which the Ninth Circuit's rule encouraged, or even failed to penalize, inefficient fee litigation. Nor have cases from the many other jurisdictions that have long left fee-defense compensation within the bankruptcy courts' authority shown anything but the same sober exercises of discretion that attend all fee-related decisions.

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[21] See Presentation of the Landmark ABI Fee Study: Conclusions and Ramifications 8, ¶¶ 15-16 (American Bankruptcy Institute, Winter Leadership Conference 2007), available at http:goo.gl/zZltxr; Lubben (Reporter), Chapter 11 Professional Fee Study 35 (American Bankruptcy Institute 2007).

Compensating only necessary and successful defenses functions as a built-in disincentive both to meritless fee applications and meritless fee challenges.

In *Jean*, this Court rejected the argument that allowing defense fees would "encourage exorbitant fee requests, generate needless litigation, and unreasonably burden the federal fisc." 496 U.S. at 162-163. The Court disagreed because trial courts "retain substantial discretion" over defense-fee awards. *Id.* at 163. Moreover, "[i]f the [objector] could impose the cost of fee litigation on prevailing parties," the statute's policy goals would be thwarted. *Id.* at 163-164. Both points fully apply here.

4. The court of appeals professed "confiden[ce]" that any remaining incentive distortions can be dealt with by bankruptcy courts—even as it removed the chief tool that bankruptcy courts use to achieve that goal. The Fifth Circuit thought that exercising "vigilance and sound case management"—including fee shifting for "bad faith" or "vexatiou[s]" conduct—could "thwart punitive or excessively costly attacks" on fee applications. Pet. App. 21a.

This case and many other reported defense-fee cases cast doubt on that unexplained and unsupported assertion. True, if professionals can prove a rare violation of Bankruptcy Rule 9011 (analogous to Federal Rule of Civil Procedure 11) or the common-law bad-faith standard of *NASCO* v. *Chambers, Inc.*, 501 U.S. 32, 45-46 (1991), then objectors would face sanctions that might include attorneys' fees. But lawyers can be savvy enough to approach the steep sanctions threshold without crossing it, while nonetheless imposing unreasonable burdens that dilute core fees. While "sanctions provide some protection against harassment, a fee objection is a gambit easily veiled in a policy of economy." Springer, *supra*, at 539 n.101. Regardless, § 330(a)'s text permits discretionary defense-fee awards *without* having to establish that an "attack" was "punitive" or "excessively costly," much less

in "bad faith." Pet. App. 21a. The court of appeals' well-founded trust in bankruptcy judges' case-management abilities, *ibid.*, should instead have given it confidence that they would judiciously award defense fees.[22]

This Court repeatedly has rejected attempts to limit statutory attorneys' fees—including defense fees—to those incurred responding to bad-faith (or even less egregious) litigation. *Jean* refused to limit defense fees to cases where the government's core-fee objections were "not substantially justified." 496 U.S. at 157. Even prevailing *defendants* in civil-rights actions need not show that plaintiffs brought claims in "bad faith" to recover fees. *Christiansburg*, 434 U.S. at 419. And while the Patent Act textually restricts attorneys' fees to "exceptional" cases, the Court recently refused to equate that limit to sanctionable conduct. *Octane*, 134 S. Ct at 1756-1757. If requiring bad faith "had been the intent of Congress, no statutory provision [allowing fees] would have been necessary, for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith." *Christiansburg*, 434 U.S. at 418-419; accord *Octane*, 134 S. Ct. at 1758 (reading in a bad-faith threshold would render attorney-fee provision "superfluous").

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This case does not present the question of whether the bankruptcy and district courts properly exercised discre-

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[22] Nor does an applicant's "[c]ompliance with the rules" requiring detailed fee applications, Pet. App. 17a, or the Code's "capacious reasonableness and necessity standards," in fact "shield * * * [professionals] from attempts at fee reduction," *id.* at 21a. As this case illustrates, meritorious fee applications under the Code's capacious compensation standards provide no protection against core-fee dilution and pose no deterrent to objectors who can impose the full costs of objections even on applicants who prevail.

tion in awarding and upholding defense fees for Baker Botts. ASARCO argued only that courts *never* possess authority to award such fees under § 330(a). This Court should enforce the text, structure, history, and purpose of § 330(a), to conclude that bankruptcy courts do have authority to award defense fees. The Court need not further define the circumstances when defense fees may or may not be awarded. As in *Octane*, it suffices to reverse the Fifth Circuit's counter-textual bar on such fees and instruct that bankruptcy "courts may determine whether [defense fees are compensable under § 330(a)'s test] in the case-by-case exercise of their discretion, considering the totality of the circumstances." 134 S. Ct. at 1756. Bankruptcy courts will draw on a deep body of precedent and practice in making those determinations, both under § 330(a) and other fee statutes. Accordingly, the judgment below should be reversed.

## CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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